

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

RICHARD WHITLEY, CAROLETA M. DURAN,)
TERRY J. KOCH, MARK D. GRANDY, JOHN)
M. GATES, and SCOTT NEWELL, on behalf of)
themselves and those similarly situated,)

Plaintiffs,

v.

J.P. MORGAN CHASE & CO.; JPMORGAN)
CHASE BANK N.A.; J.P. MORGAN)
INVESTMENT MANAGEMENT INC., aka J.P.)
MORGAN ASSET MANAGEMENT; and)
JPMORGAN RETIREMENT PLAN SERVICES)
LLC,)

Defendants.

Case No. 12-cv-2548
The Honorable John G. Koeltl

**PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE OF
SUPPLEMENTAL AUTHORITY IN FURTHER SUPPORT OF DEFENDANTS'
MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT**

On January 23, 2013, Defendants submitted their Notice of Supplemental Authority in support of their pending Motion to Dismiss Plaintiffs' First Amended Complaint, citing *In re SLM Corp. ERISA Litig.*, No. 10-cv-4061 (2d Cir. Dec. 26, 2012) ("Slip Op."). Plaintiffs respond as follows:

I. DISCUSSION

In their Opposition to the Defendants' Motion to Dismiss, Plaintiffs showed that under the Second Circuit's recent decision in *NECA – IBEW Health and Welfare Fund*, 693 F.3d 145, 165 (2d Cir. Sept. 6, 2012), their Amended Complaint establishes statutory and Article III standing against each of the Defendants, and therefore any remaining issues about the scope of the proposed class should be addressed in conjunction with Plaintiffs' motion for class

certification and not as a matter of jurisdictional standing. See Dkt. #54, pp. 23-25. Defendants' reliance on the Second Circuit's December 26, 2012 opinion in *In re SLM Corp. ERISA Litig.*, No. 10-cv-4061 (2d Cir. Dec. 26, 2012), provides no grounds for departing from *NECA – IBEW*'s precedent. See Opinion attached as Exhibit 1.

First, Defendants fail to acknowledge anywhere that the cursory single paragraph in *In re SLM Corp. ERISA Litig.* that purports to address standing is of no precedential value. The Second Circuit disposed of the case by issuing a summary order. Under the Second Circuit's Local Rule 32.1.1, cases that are disposed of by summary order “do not have precedential effect.”

Second, *In re SLM Corp., ERISA Litig.* addresses a situation that is not presented in the instant case and is therefore of no assistance in determining whether Plaintiffs have standing to assert ERISA claims on behalf of all participants who were invested in any of JPM's Stable Value Funds during the class period. They have such standing because, among other things, the Stable Value Fund's assets are held in one or more collective trusts managed by JPM, each of which held substantial assets in the same commingled investment fund – the JPM's Intermediate Bond Fund. Am. Comp. pp. 93, 95.

In *In re SLM Corp. ERISA Litig.*, the Second Circuit merely decided that 401(k) participants in the company's *savings* plan did not have standing to bring claims on behalf of the company's *retirement* plan because none of the plaintiffs were ever participants in the latter plan. A key to the Second Circuit's decision was the fact that the “...decision not to divest the Retirement Plan of SLM stock must be *viewed separately* from the decision not to divest the Savings Plan of SLM stock.” Slip. Op. at 6 (emphasis added). Indeed, as the district court's opinion makes clear, the two plans were fundamentally different because the savings fund,

unlike the retirement fund, was *required* to invest in Sallie Mae stock. *In re SLM Corp. ERISA Litigation*, 08 Civ. 4334 (WHP), 2010 WL 3910566 at *2-3 (S.D.N.Y. Sept. 24, 2010).

In contrast here, Plaintiffs are all investors in JPM Stable Value Funds through their 401(k) funds, and each of the JPM Stable Value Funds held substantial portions of their assets in the same JPM Intermediate Bond Fund. Thus, like every other member of the proposed class, Plaintiffs were ultimately invested in JPM's Intermediate Bond Fund and the challenged investment decisions cannot be "viewed separately" from each other.

CONCLUSION

For all the reasons stated above and in Plaintiffs' Opposition to Defendants' Motion to Dismiss, the motion should be denied.

Respectfully submitted,

Dated: January 29, 2013

/s/ Michael M. Mulder

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CERTIFICATE OF SERVICE

I, Michael M. Mulder, hereby certify that on this 29th day of January, 2013, I electronically filed PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT using the United States District Court for the Southern District of New York's CM/ECF system, which will provide service of such filings via email to all counsel of record in this action:

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